

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

THE DEPARTMENT OF HUMAN SERVICES

In the Matter of JustUs Health's Petition for
a Determination that the Department of
Human Services is Enforcing a Manual as
an Unadopted Rule

ORDER

This matter is pending before Administrative Law Judge James E. LaFave.

On November 25, 2019, JustUs Health, petitioned the Office of Administrative Hearings under Minn. Stat. § 14.381 (2018) for an order holding that the Minnesota Department of Human Services (Department) is enforcing guidelines in its Minnesota Health Care Program Provider Manual related to gender-confirming surgery as though they were duly adopted rules. Oral argument on the petition was held on January 3, 2020, and the record in this matter closed on March 12, 2020.

Phil Duran, Director of Advocacy, Research and Education for JustUs Health, represents JustUs Health. Michael Leonard, Assistant Attorney General, represents the Department.

Based on the submissions of the parties and the hearing record, and for the reasons set out in the Memorandum below,

IT IS HEREBY ORDERED THAT:

1. The Department shall cease enforcing the following unpromulgated rules in its Provider Manual:

- requiring that all persons seeking gender-confirming surgery must be 18 years old;¹ and,
- denying coverage for facial gender-confirming surgery on the grounds it is cosmetic without considering whether the procedure is medically necessary.²


2. The Department shall publish this decision in the *State Register*.

¹ See Ex. 1 at 3.

² *Id.* at 2.

3. The Department shall bear the costs of this proceeding.

Dated: April 16, 2020


JAMES E. LAFAVE
Administrative Law Judge

NOTICE

This decision is the final administrative decision under Minn. Stat. § 14.381. It may be appealed to the Minnesota Court of Appeals under Minn. Stat. §§ 14.44-.45 (2018).

MEMORANDUM

I. Factual and Regulatory Background

The Department administers the Minnesota Health Care Programs (MHCP), which include, among others, Medical Assistance and MinnesotaCare.³ Medical Assistance (MA) provides access to health care for “needy persons whose resources are not adequate to meet the cost of such care.”⁴ MinnesotaCare is a separate health care program for low-income families and individuals who do not otherwise qualify for MA.⁵ The Department contracts with managed-care organizations (MCOs) to provide health-care services for MHCP members.⁶

Under the MHCP, the Department must provide prior authorization for some medical services.⁷ MCOs render these prior authorizations on the Department’s behalf.⁸ A request for prior authorization must be approved if it is “medically necessary as determined by prevailing medical community standards or customary practice and usage; . . . appropriate and effective to the medical needs of the recipient; . . . timely, considering the nature and present state of the recipient’s medical condition; . . . furnished by a provider with appropriate credentials; . . . [the] least expensive appropriate alternative health service available; and . . . represent[s] an effective and appropriate use of program funds.”⁹ Medical necessity is defined, in relevant part, as

³ See Minn. Stat. § 256.962 (2018).

⁴ Minn. Stat. § 256B.01 (2018).

⁵ See Minn. Stat. §§ 256L.04, .07 (2018).

⁶ See Minn. Stat. §§ 256B.69, 256L.12.

⁷ Minn. Stat. § 256B.0625, subd. 25 (2018).

⁸ See Affidavit (Aff.) of Phil Duran at Exhibit (Ex.) 10; see *also* Oral Argument Digital Recording (Jan. 3, 2020) (on file with the Minn. Office Admin. Hearings).

⁹ Minn. R. 9505.5030 (2019).

a health service that is consistent with the recipient's diagnosis or condition and . . . *is recognized as the prevailing standard or current practice by the provider's peer group* . . . is rendered in response to a life threatening condition or pain; or to treat an injury, illness, or infection; or to treat a condition that could result in physical or mental disability; or to care for the mother and child through the maternity period; or to achieve a level of physical or mental function consistent with prevailing community standards for diagnosis or condition.”¹⁰

As part of its administration of the MHCP, the Department publishes and maintains the MHCP Provider Manual.¹¹ The Provider Manual gives guidance to healthcare providers on matters including enrollment requirements, billing, coverage of particular services, and requirements for preauthorization.¹² Providers may request reconsideration of any preauthorization denial and must include with the request an explanation of why an exception should be made.¹³

A. Gender-Confirming Surgeries

The Provider Manual includes guidelines on gender-confirming surgeries for individuals diagnosed with gender dysphoria.¹⁴ “Gender dysphoria is the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender.”¹⁵ “Gender dysphoria is a serious medical condition, which if left untreated or inadequately treated can cause adverse symptoms.”¹⁶

In 2016, the Department asked the Health Services Advisory Council (HSAC), a statutorily established body created to advise the Commissioner on health services pertaining to the administration of medical benefits, to provide recommendations regarding the coverage of gender-confirming surgeries for MHCP members.¹⁷ The HSAC is comprised of physicians, other health care providers, and a consumer representative.¹⁸ In making recommendations to the Department, HSAC considered guidelines published by the Endocrine Society and the World Professional Association for Transgender Health (WPATH) and received input from clinicians with expertise in treating gender dysphoria.¹⁹ The Department generally recognizes WPATH standards as constituting prevailing provider practices with regard to medical necessity.²⁰

¹⁰ Minn. R. 9505.0175, subp. 25 (2019) (emphasis added).

¹¹ Aff. of Julie Marquardt.

¹² *Id.*

¹³ *Id.*

¹⁴ Aff. of P. Duran at Ex. 1.

¹⁵ *Id.* at Ex. 11 at 6.

¹⁶ *Id.*

¹⁷ Aff. of Joyce Garrett.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Aff. of P. Duran at Ex. 7 at 3.

HSAC recommended delaying coverage of all gender-confirming surgery until after an individual has turned 18 years old.²¹ Although the WPATH standards generally recommend that individuals seeking gender-confirming surgery be 18 years old, they specifically reject a minimum-age criterion for mastectomies, recommending a case-by-case analysis in those instances.²² In addition, HSAC defined facial gender-confirming procedures to be cosmetic, and not medically necessary, under any circumstances.²³ In contrast, the WPATH articulates that surgery requests should be evaluated for medical necessity on a case-by-case basis and not be categorically considered cosmetic.²⁴ JustUs Health raised concerns that the HSAC guidelines would conflict with the WPATH standards, but the Department nonetheless enacted guidelines in conformance with the HSAC recommendations, as described above.²⁵

Since that time, the Department's Human Services Judges, after an appeal, have approved coverage in several instances, despite the policy guidelines. First, in early 2018, F.B. sought coverage for facial gender-confirming surgery through Blue Plus, one of the Department's MCOs.²⁶ Blue Plus denied F.B.'s request, specifically relying on the language in the Provider Manual.²⁷ F.B. appealed, and a Human Services Judge reversed Blue Plus's denial, noting that the Provider Manual conflicts with the WPATH standards.²⁸ Thereafter, Mr. Duran, JustUs Health's attorney, requested that the Department set aside its policy language to reflect this decision, but the Department declined to do so.²⁹

In November 2018, C.G., a minor, sought coverage for mastectomy, which C.G.'s doctor considered medically necessary.³⁰ Blue Plus denied this request, stating: "The Minnesota Health Care Programs (MHCP) Provider Manual policy on Gender-Confirming Surgery has criteria that needs to be met for coverage. This includes that you must be 18 years of age or older. Due to this your request for coverage has been denied."³¹ Following C.G.'s appeal, a human services judge stated that this was "not a difficult case" and noted that "the recommendations in the Provider Manual are inconsistent with the position of [C.G.'s] doctors and therapist, inconsistent with the WPATH Standards of Care, and inconsistent with the guidelines developed by the Endocrine Society."³² The judge further stated that "[n]either Blue Plus nor DHS has provided any evidence that a strict age-requirement for gender-confirming chest surgery is consistent with prevailing medical community standards. All the evidence appears to go in the other direction – that medical necessity for such a procedure must be

²¹ Aff. of J. Garrett.

²² See Aff. of P. Duran at Ex. 11 at 8.

²³ See *id.* at Ex. 1.

²⁴ See *id.* at Ex. 7.

²⁵ See *id.* at Ex. 2.

²⁶ *Id.* at Exs. 5, 6.

²⁷ *Id.* at Ex. 6.

²⁸ *Id.* at Ex. 7.

²⁹ *Id.* at Ex. 8.

³⁰ *Id.* at Ex. 9.

³¹ *Id.*

³² *Id.* at Ex. 11.

determined on an individual, case-by-case basis.”³³The judge reversed Blue Plus’s determination and recommended that the Department’s “written policy that chest surgery to treat gender dysphoria in transgender males under the age of 18 is never medically necessary . . . be amended accordingly and with all due haste.”³⁴

Mr. Duran again contacted the Department to request that it modify its language in the Policy Manual.³⁵ The Department conceded that its policies were in some ways “contrary to those found in the WPATH standards.”³⁶ The Department suggested that the language be reevaluated at the next HSAC meeting, which was expected to occur in March 2020.³⁷ On March 11, 2020, the Department notified JustUs Health that the HSAC meeting scheduled for March 12 would not occur, because the Department was “working to fill several vacancies” with interviews for those vacancies “begin[ing] shortly.”³⁸

II. Legal Framework

The Minnesota Administrative Procedure Act (MAPA) defines a “rule” as: “every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.”³⁹ Interpretations of existing statutes which “make specific the law enforced or administered by the agency,” are deemed to be “interpretative rules.”⁴⁰ With limited exceptions, an agency’s interpretative rules are valid only if they are promulgated in accordance with the rulemaking procedures of MAPA.⁴¹

III. Analysis

JustUs Health argues the Department is using its Policy Manual as an unpromulgated rule to bar all gender-confirming procedures to those under the age of 18 and to bar all facial gene-confirming procedures as cosmetic.

The Department disagrees. It first argues that JustUs Health does not have standing to challenge its guidelines in the Policy Manual.⁴² In addition, the Department

³³ *Id.* at Ex. 11 at 16.

³⁴ *Id.* at Ex. 11 at 3.

³⁵ See Aff. of P. Duran at Ex. 13.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Letter from Phil Duran to Administrative Law Judge (Mar. 12, 2020) (on file with the Minn. Office Admin. Hearings).

³⁹ Minn. Stat. § 14.02, subd. 4 (2018).

⁴⁰ See *St. Otto’s Home v. Minn. Dep’t of Human Services*, 437 N.W.2d 35, 43-44 (Minn. 1989); *White Bear Lake Care Ctr., Inc. v. Minn. Dep’t of Pub. Welfare*, 319 N.W.2d 7, 9 (Minn. 1982); *Ebenezer Soc’y v. Minn. Dep’t of Human Servs.*, 433 N.W.2d 436, 439 (Minn. Ct. App. 1988); *Benson v. Comm’r of Pub. Safety*, 356 N.W.2d 799, 801 (Minn. Ct. App. 1984).

⁴¹ See Minn. Stat. § 14.03, subd. 3(b) (2018); *In re Application of Q Petroleum*, 498 N.W.2d 772, 780 (Minn. Ct. App. 1993), *review denied* (Minn. 1993).

⁴² Response by Department of Human Servs. to Petition by JustUs Health for an Order to Cease Enforcement of Unadopted Rule at 6-7 (Dec. 19, 2019) (Department’s Response).

contends that “provisions of the provider manual are not ‘rules’ for purposes of section 14.381” and that its “action does not amount to unpromulgated rulemaking because the provider manual’s gender-confirming surgery guidelines do not amount to legislative or interpretive rules.”⁴³ The Department also maintains that there is no indication the Provider Manual guidelines are dispositive.⁴⁴ Lastly, the Department contends that JustUs Health’s petition is requesting relief not available in this proceeding.⁴⁵ These arguments will be addressed in turn.

A. Standing

The Department argues that JustUs Health lacks standing because it “does not suggest that any of its members are being denied treatment as a result of the Provider Manual’s guidelines on gender-confirming surgery.”⁴⁶ The Department’s argument is misplaced.

“Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court.”⁴⁷ Standing is essential to a court’s exercise of jurisdiction; absent standing a court does not have jurisdiction to hear a matter.⁴⁸ “A party has standing if (1) the legislature has conferred standing by statute, or (2) a party has suffered ‘injury-in-fact.’”⁴⁹

Under the law, “[a] person may petition the Office of Administrative Hearings seeking an order of an administrative law judge determining that an agency is enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule.”⁵⁰ Chapter 14 does not define “person.” However, chapter 645, governing the interpretation of statutes and rules, states that the term “[p]erson may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations.”⁵¹ Therefore, JustUs Health, an association, qualifies as a person under the statute. And, contrary to the Department’s assertion, the statute simply does not require an injury; any “person” may challenge an unpromulgated rule.⁵² Therefore, JustUs Health has standing to challenge the Department’s Policy Manual guidelines as unpromulgated rules.

⁴³ *Id.* at 7, 9.

⁴⁴ *Id.* at 8.

⁴⁵ *Id.* at 10.

⁴⁶ Department’s Response at 6.

⁴⁷ *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn.1996).

⁴⁸ *Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 27 (Minn.1989).

⁴⁹ *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 913 (Minn. App. 2003).

⁵⁰ Minn. Stat. § 14.381, subd. 1(a).

⁵¹ Minn. Stat. § 645.44, subd. 7 (2018).

⁵² See *Johnson v. Grant Residents Who Want to Save Grant*, No. 6-6381-16267-CV (Minn. Office Admin. Hearings Feb. 22, 2005) (“Chapter 211B does not limit who may file a complaint and it does not require an injury in fact. This suggests that the Legislature favors a broad interpretation of standing. Chapter 211B protects the election process and does not focus exclusively on the individuals involved in the process.”).

B. Enforcement

The Department argues that the guidelines are not “rules” for purposes of section 14.381. This argument misses the point. JustUs Health agrees with the Department’s contention; in fact, that is exactly what JustUs Health is arguing. According to JustUs Health, the guidelines in the Policy Manual are *not* rules, but are being treated and enforced as such; that is where the problem lies.

The Administrative Law Judge agrees. The guidelines in the Policy Manual are not rules; they were not promulgated under chapter 14, and they are not meant to have the force and effect of law.⁵³ Rather, according to the Department, the Policy Manual is meant to be merely advisory in nature. The relevant question, however, is not whether the challenged guidelines in the Policy Manual are *rules*, but instead, are they being enforced as such.

The relevant statute requires a determination of medical necessity before a procedure can be preauthorized. And a procedure is only medically necessary if it “is recognized as the prevailing standard or current practice by the provider’s peer group.”⁵⁴ It is undisputed that for gender dysphoria, the Department considers the WPATH standards as the prevailing provider standards. Nonetheless, the Policy Manual guidelines conflict with the WPATH standards on two distinct points. First, the WPATH standards require a case-by-case evaluation of medical necessity, whereas the Department’s Policy Manual indicates that gender-confirming facial surgery is always cosmetic, i.e. never medically necessary.⁵⁵ Second, the Policy Manual requires any individual seeking gender-confirming surgery to be 18 years old; the WPATH standards are generally consistent but allow an exception for mastectomies.

An agency rule is “every agency statement of general applicability and future effect ... adopted to implement or make specific the law enforced or administered by that agency.”⁵⁶ And, as articulated above, “[a] person may petition the Office of Administrative Hearings seeking an order of an administrative law judge determining that an agency is enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule.”⁵⁷ The Department argues that it is not enforcing the Policy Manual directives.⁵⁸ The record does not support this claim.

⁵³ See *Doe v. Dep’t of Pub. Welfare*, 257 N.W.2d 816, 819 (Minn. 1977) (“The provisions included within the handbook are only advisory in nature and do not have the effect of law.”).

⁵⁴ Minn. R. 9505.0175, subp. 25.

⁵⁵ Cf. *Doe*, 257 N.W.2d at 820 (“The medical necessity of each applicant requesting funding of transsexual surgery must be considered individually, on a case-by-case basis.”).

⁵⁶ Minn. Stat. § 14.02.

⁵⁷ Minn. Stat. § 14.381, subd. 1(a).

⁵⁸ At oral argument, the Department insisted that JustUs Health “does not allege that any of its members or any person at all has been denied medically necessary treatment as a result of the gender-confirming surgery guidelines following a final decision by DHS.”

The statute requires *the Department* to preauthorize certain medical procedures, including those pertaining to gender-confirming surgery.⁵⁹ The Department, however, contracts with MCOs to provide that service. Here, the MCOs are acting on the Department's behalf, and any decision pertaining to preauthorizations, especially those made in accordance with the Department's Policy Manual guidance, must be imputed to the Department. The Department cannot argue that it does not make that enforcement decision just because it has delegated the preauthorization authority to the MCOs when those entities cite the Department's manual as the basis for their determinations.

Additionally, the Department argues that because those individuals who have appealed their denials ultimately received the procedure after review by a Department judge, the Department cannot be "enforcing" the guidelines.⁶⁰ The Department's argument is unpersuasive.

Enforcement occurs at the preauthorization stage not after an appeal. The Department is enforcing the guidelines when the MCOs, acting on the Department's behalf, use the Policy Manual guidelines to deny certain gender-confirming procedures. The fact human services judges are reversing preauthorization denials that conflict with prevailing provider standards, but are in line with Department policy, does not mean the Policy Manual guidelines are not being enforced. The Department simply cannot require people to appeal a preauthorization decision in order to receive the medical care to which they are entitled.

The evidence in the record indicates that the Department has known since before it introduced these guidelines that the two relevant policies conflict with the WPATH standards. Enforcement of those guidelines undoubtedly has chilling effect; common sense dictates that patients and providers are less likely to seek these surgeries because the Department's guidelines explicitly provide that minors cannot receive gender-confirming surgery of any kind and facial gender-confirming surgery is always cosmetic.⁶¹ In sum, to the extent that the Policy Manual guidelines conflict with prevailing provider standards, the Department is enforcing them as if they were duly adopted rules.

C. Remedy

JustUs Health asks the Administrative Law Judge order the Department to: (1) cease enforcement of unpromulgated rules that contradict the WPATH standards of

⁵⁹ See Minn. Stat. § 256B.0625, subd. 25; see also Department's Response at 2 ("Certain medical services require prior authorization *from DHS* in order to be covered under the MHCP." (emphasis added)), 5 ("Since DHS updated the Provider Manual, several individuals have sought administrative review of the denial of preauthorization for gender-confirming surgeries that *DHS initially denied* on the ground that the recipient was a minor or the procedure was determined to be cosmetic." (emphasis added)).

⁶⁰ At oral argument, the Department insisted that JustUs Health "does not allege that any of its members or any person at all has been denied medically necessary treatment as a result of the gender-confirming surgery guidelines following a final decision by DHS."

⁶¹ At the oral argument, JustUs Health indicated that Mayo Clinic providers will not even submit preauthorizations for approval because of this language in the Provider Manual.

care; (2) direct the MCO partner to similarly cease enforcement of unpromulgated rules; and (3) modify its Provider Manual, including online content, in accordance with this Order.⁶² The Department, however, argues that “the statute does not permit an administrative law judge to direct an agency to take any specific affirmative action.”⁶³ The statute provides that a party may seek an order directing “the agency to cease enforcement of the unadopted rule that is the subject of the petition.”

The statute does not provide further guidance, but none is necessary. Because the Administrative Law Judge has concluded that the Department is enforcing unpromulgated rules, he now directs the Department to cease enforcement of them.

J. E. L.

⁶² Petition at 6 (Nov. 22, 2019).

⁶³ Department’s Response at 10.